No. 14816.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM R. LEVECKE and REED LEVECKE, doing business as the LEVECKE COMPANY,

Appellants,

vs.

GRIESEDIECK WESTERN BREWERY CO., a corporation, and CARLING BREWING COMPANY, a corporation,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Statement of Jurisdiction.

The plaintiffs-appellants filed an action against appellee The Griesedieck Company (formerly known as Griesedieck Western Brewery Company) and appellee Carling Brewing Company, Incorporated, in the Superior Court of the State of California, in and for the County of Los Angeles, on February 24, 1955. [Tr. pp. 11 *et seq.*]

On March 29, 1955, service of summons and complaint having been attempted upon appellee The Griesedieck Company by service upon the Secretary of State for the State of California, and service of summons and complaint having been attempted upon appellee Carling Brewing Company, Incorporated, by service upon an employee, each appellee filed a petition for removal of said action

from the Superior Court of the State of California to the United States District Court, Southern District of California, Central Division. Each appellee filed its undertaking on removal at the same time. The petitions for removal were filed pursuant to Title 28, United States Code, Sections 1441 and 1446.

Thereafter, on April 4 and 11, 1955, each appellee filed a notice of motion, and a motion, to set aside, vacate and quash the service of summons and complaint, and a notice of motion and a motion to dismiss the complaint. [Tr. pp. 23-25, 49-51.] Said motions duly came on to be heard together on oral argument and affidavits.

Thereafter, on May 12, 1955, the District Court made its order granting the motion to set aside, vacate, and quash the service of summons and complaint because of lack of jurisdiction of the Court over the person of each of appellees and because of insufficiency of service of process upon them. The motion to dismiss was denied. [Tr. pp. 147-150.] The order granting the motion to set aside, vacate and quash service of summons and complaint was docketed and entered on May 13, 1955. [Tr. p. 150.]

The appellants have appealed from this order, as a final decision, pursuant to Title 28, United States Code, Section 1291.

Preliminary.

It is not amiss to point out at this time that certain of the evidence introduced by the parties before the District Court was in sharp conflict.

This factor is of extreme importance in this appeal because the plaintiffs' entire case is based upon *their* version of those facts to which the conflicting evidence related.

Under these circumstances this appeal must avail them nothing, for:

> "All controverted questions of fact must be taken in their most favorable possible light for the (party) who prevailed at the trial. Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A."
>
> *United States v. Comstock Extension Mining Co., Inc.,* 214 F. 2d 400, 403 (9th Cir., 1954).

See, also:

> *Palakiko v. Harper,* 209 F. 2d 75, 89 (9th Cir., 1953).

Statement of the Case.

Introductory.

Appellants have omitted from their brief a Statement of the Case, choosing, rather, to present under the topic "Facts" a discussion which is argumentative, inaccurate and incomplete in many particulars. They state but a small portion of the evidence in affidavit form upon which the District Court made its Order, with the result that they do not give a fair or complete statement of the case. Consequently, appellees find it necessary to give their own statement of the case. The many omissions from appellants' discussion of the facts will be supplied in this statement, and the inaccuracies and unwarranted inferences from the evidence contained in appellants' treatment under the topic "Facts" will be noted separately at the end of this statement.

Due to the factual differences with respect to The Griesedieck Company and Carling Brewing Company, Incorporated, each appellee will be treated separately in this statement of the case.

The sole issue involved in this appeal is whether or not the District Court had jurisdiction over appellees on the causes of action alleged by plaintiffs. Decisive of that question is whether or not The Griesedieck Company was "doing business" in California, whether California has assumed jurisdiction over a cause of action arising out of the state and which is unrelated to business carried on in the state, and whether due process is satisfied if a corporation engaging only in the interstate business in California is forced to defend there a claim arising outside the state and which is unrelated to business done in California.

These questions arose in the following manner:

(a) The Griesedieck Company.

Prior to November 1, 1954, Griesedieck Western Brewery Company was engaged in manufacturing and selling beer from its brewery and offices in Belleville, Illinois, and from its brewery and offices in the City of St. Louis, Missouri. On November 1, 1954, Griesedieck Western Brewery Company sold and transferred to Carling Brewing Company, Incorporated, for cash, all of its brewing assets, equipment, real estate, plants and inventory, and has not engaged in the brewing business at any time thereafter. Since that time Griesedieck Western Brewery Company has been known as The Griesedieck Company. [Tr. pp. 26-27.]

Prior to the sale of its business, such business as Griesedieck Western Brewery Company (hereinafter referred to as Griesedieck) did with respect to purchasers located in California consisted of the following:

(1) The receipt and acceptance in Belleville, Illinois, or in St. Louis, Missouri, of orders from the

plaintiffs and from Drexel Distributing Company, both located in California. [Tr. p. 27.]

(2) The filling of these orders by the shipment of its products by railroad common carrier from its plant in Illinois or from its plant in Missouri to the two purchasers in California. [Tr. p. 27.]

(3) All shipments fulfilling these orders originated at either of the company's two plants outside California and such sales were made and billed f.o.b. the plants of Griesedieck. [Tr. p. 27.]

(4) On all sales made by Griesedieck to the two purchasers in California the title to the merchandise passed to the purchaser at the time of delivery by Griesedieck to the railroad carrier in Illinois or Missouri, and all invoices and statements relating to such sales were mailed from the company's offices in Illinois or in Missouri direct to the purchasers. [Tr. p. 27.]

Prior to November 1, 1954, when appellee Griesedieck sold its brewing assets, equipment, real estate, plants and inventory to the appellee Carling Brewing Company, Incorporated (hereinafter referred to as Carling), Griesedieck notified the plaintiffs of the contemplated sale, and that following the date of such sale Griesedieck would no longer be engaged in the brewing business and would thereafter ship no more beer to the plaintiffs. [Tr. p. 112.]

Since November 1, 1954, appellee Griesedieck has not sold or shipped beer to purchasers in California or elsewhere, or engaged in any activities relating to the beer industry. [Tr. pp. 26, 28.]

(b) Carling Brewing Company, Incorporated.

Carling Brewing Company, Incorporated, is a Virginia corporation, licensed to do business in the State of Ohio, which is the state of its principal place of business. [Tr. p. 51.]

Prior to November 1, 1954, Carling Brewing Company for many years engaged in the manufacture and sale of beer from its brewery located in Ohio. [Tr. p. 52.]

On November 1, 1954, Carling acquired by purchase from Griesedieck all of the latter's brewing assets, equipment, real estate, plants and inventory, and since that date has also engaged in manufacturing and selling beer from its brewery and offices in Belleville, Illinois, and St. Louis, Missouri, respectively. [Tr. p. 52.]

At all times material in the complaint Carling was selling in interstate commerce its beer products in the State of California. Since November 1, 1954, when it acquired the assets and property of Griesedieck, Carling has not sold in California the beer products formerly manufactured by Griesedieck and which Griesedieck formerly sold to the plaintiffs. [Tr. p. 145.]

On February 24, 1955, plaintiffs filed their action for breach of contract and fraud.

(c) The Evidence as It Relates to The Griesedieck Company

The District Court made its order quashing service of summons and complaint upon The Griesedieck Company upon evidence which showed that:

(1) The only business which Griesedieck has ever done with respect to purchasers in California was done prior to November 1, 1954, and was done in

the course of interstate commerce between itself and two purchasers. [Tr. pp. 26, 27.]

(2) Such business consisted of the receipt and acceptance of orders from the plaintiffs and from Drexel Distributing Company, both located in California, and the filling of said orders by the shipment of its products by railroad common carrier from its plant in Illinois and from its plant in Missouri to the two purchasers residing in California. [Tr. p. 27.]

(3) All such shipments originated at either of the company's two plants outside California and such sales were made and billed f.o.b. the plants of Griesedeick, and that on all sales made to the two purchasers in California the title to the merchandise passed to the purchaser at the time of delivery by this defendant to the railroad carrier in Illinois or in Missouri. [Tr. p. 27.]

(4) All invoices and statements relating to such sales were mailed from Griesedieck's offices in Illinois or in Missouri direct to the purchasers. [Tr. p. 27.]

(5) The plaintiffs, as a wholesaler and independent distributor of Griesedieck's products in California, sold beer to such wholesale and retail outlets as they chose to obtain. [Tr. p. 27.]

(6) The plaintiffs purchased beer from Griesedieck as principals on their own account and were billed for all such purchases at time of shipment, paying the wholesale price for the beer. [Tr. p. 27.]

(7) The plaintiffs were responsible for, and paid to the carrier, all transportation charges from point of origin to destination of the shipment. [Tr. p. 27.]

(8) The plaintiffs resold on their own account the beer they had purchased from the defendant; that they had sole responsibility for fixing prices on sales by them and for the billing and collection of their accounts, without any control or supervision by Griesedieck. [Tr. pp. 27, 28.]

(9) Griesedieck did not require the plaintiffs to maintain any records for it, to collect any data, or to file any reports with it with respect to the plaintiffs' operation of their business or with respect to their disposition of the beer sold by Griesedieck to them. [Tr. p. 28.]

(10) Neither of the plaintiffs was ever an officer or employee of Griesedieck; that neither plaintiff ever received a salary, an expense account or other personal compensation from Griesedieck. [Tr. p. 28.]

(11) Griesedieck had never done any of the following acts:

(a) Maintained an office or place of business in the State of California [Tr. p. 29];

(b) Owned or leased any real estate in the State of California [Tr. p. 29];

(c) Owned, leased or operated any personal property in the state of California [Tr. p. 29]:

(d) Maintained or leased a warehouse in the State of California [Tr. p. 29];

(e) Maintained an inventory or stock of goods in the State of California [Tr. p. 29];

(f) Had any salesmen or other employees working within the State of California or soliciting orders in the State [Tr. p. 29];

(g) Advertised by newspaper, radio, television, billboards or in any other manner within the State of California, any advertising within California of Griesedieck's products being done by the plaintiffs [Tr. p. 29];

(h) Authorized the listing of its corporate name in any telephone or other directory published within the State of California [Tr. p. 29];

(i) Been assessed any taxes by the State of California or paid any to said State [Tr. p. 29];

(j) Applied for or received any licenses or permits from the State of California for the purpose of manufacturing, selling, importing or otherwise engaging in its business within said State [Tr. p. 29];

(k) Listed a California office or agent on its stationery [Tr. p. 30];

(l) Had an officer or employee who ever resided in California during such employment [Tr. p. 30];

(m) Shipped to the plaintiffs or to anyone else in California on a consignment basis [Tr. p. 30];

(n) Shipped its products to California in equipment owned or leased by it [Tr. p. 30];

(o) Made local deliveries within California of its products [Tr. p. 30];

(p) Maintained a bank account in the State of California [Tr. p. 30];

(q) Made collections or received any payments for its merchandise within the State of California [Tr. p. 30];

(r) Made any purchases within California of goods or supplies [Tr. p. 30];

(s) Lent any money to the plaintiffs or to any of their customers within the State of California [Tr. p. 30];

(t) Entered into any contracts or solicited any orders within the State of California [Tr. p. 30].

(12) On four occasions, over a period of five years, the then president of Griesedieck, at the request of the plaintiffs, accompanied one or both of the plaintiffs in visits to the customers of the plaintiffs, and that on these occasions no attempt was made on the part of Griesedieck to solicit orders for sales of beer, and the president of Griesedieck made no such sales. [Tr. p. 124.]

(13) On one occasion Griesedieck shipped business cards to the plaintiffs which were void of printing except for the colored trade mark of Griesedieck's products. [Tr. pp. 120, 128-130.]

(14) On one occasion Griesedieck, at the request of plaintiffs, shipped them a small number of the sales delivery books which Griesedieck used in making its deliveries of beer in Missouri, and which the plaintiffs represented they wished to use as a form in making their own sales delivery books. These delivery books were intended only to be used in Missouri, and the plaintiffs were never required, authorized or requested to use such delivery books in California, and if they were used such use was without the knowledge or authorization of Griesedieck. [Tr. p. 132.]

(15) Griesedieck did not authorize or have knowledge of the fact that plaintiffs printed, or had printed on the blank business cards which Griesedeick sent to them at their request the corporate name of Griesedieck. [Tr. pp. 128-130.]

(16) Griesedieck did not authorize, or have knowledge of, or pay for, the listing of its corporate name in the Los Angeles Telephone directories. [Tr. p. 134.]

(d) Appellants' Erroneous Statements, Conclusions and Inferences.

As is set out at length in the argument, *infra,* the crux of appellants' brief is that since Mr. Edward Jones, then president of Griesedieck, made four trips to California, at the request of the plaintiffs, and accompanied one of the plaintiffs in visiting stores which were customers of the plaintiffs, and later wrote letters to these retailers, that this constituted such activities as to bring Griesedieck within the jurisdiction of courts of California by means of service on the Secretary of State.

It must be pointed out in this connection that Mr. Jones did not make "frequent" or "numerous" visits to California, but that he visited the state on but four occasions over a period of five years. [Tr. p. 124.]

In the interest of brevity and clarity the further misstatements, erroneous inferences and inaccuracies in Appellant's brief will be treated numerically with the evidence relating thereto set out below.

(1) "Said appellee Griesedieck delivered to appellant its particular form of sales delivery books and it required appellants to make delivery of appellee's beer products on said delivery slips." (App. Br. p. 5.)

Appellants' Evidence.

"That said defendant (Griesedieck) delivered to plaintiffs sales delivery books and required plaintiffs to make delivery of defendant's beer products on said delivery books. . . ." [Tr. p. 73.]

Appellee's Evidence.

". . . these sales delivery books were obtained from (Griesedieck) by (the plaintiffs) at their request and upon their representation that they wanted to use said delivery books as a form to follow in preparing sales delivery books used by their company . . . Griesedieck did not at any time require the LeVeckes to make delivery . . . on delivery slips illustrated by said Exhibit G . . . nor did it authorize the (plaintiffs) to use sales delivery books printed in the name of (Griesedieck)." [Tr. p. 132.]

(2) "Griesedieck also delivered to appellants, its particular form of 'order confirmation'. This form, which was approved by said appellee, was signed by appellants, *as agents and employees of said appellee.*" (Their emphasis; App. Br. p. 5.)

Appellants' Evidence.

"that on all large sales of beer in California, the orders for said sales were

Appellee's Evidence.

"Said form was not used by (Griesedieck) nor was the use of said form by

Appellants' Evidence.

confirmed on an 'Order Confirmation,' the form of which was approved by said defendant and was signed by plaintiffs as agents and employees of said defendant." [Tr. p. 73.]

Appellee's Evidence.

(the plaintiffs) ever approved by (Griesedieck) . . . If said form were used by (the plaintiff) . . . then such use was for its own purposes and without the knowledge or approval of (Griesedieck)." [Tr. p. 133.]

(3) "Letterheads and envelopes of said appellee Griesedieck with said company's name and principal office address thereon, were sent to California for appellant's use *as agents of said appellees.*" (Their emphasis; App. Br. p. 5.)

Appellants' Evidence.

"Letterheads and envelopes of defendant (Griesedieck) with said company's name and principal office address were sent to plaintiffs in California for use by plaintiffs as agent of said defendant." [Tr. p. 74.]

Appellee's Evidence.

"Cuts of Hyde Park and Stag beer trademarks were supplied by (Griesedieck) to the LeVeckes and they were authorized to use them on their own business letterhead . . . The company files contained a request from (plaintiffs) . . . for a Stag cut and for two hundred Hyde Park 75 and two hundred Stag envelopes. I had no knowledge of this request, but upon questioning former clerical employees of (Griesedieck) I am informed that the materials were sent

Appellants' Evidence.

Appellee's Evidence.

to the LeVeckes shortly after receipt of the request. I have no knowledge of any request by the LeVeckes for authority to use (Griesedieck) envelopes or letterheads as agents or employees of (Griesedieck) and no authority was given to (the plaintiffs) to use said material in any manner which would represent that they were acting as agents or employees of said company." [Tr. p. 134.]

(4) "Business cards of said appellee Griesedieck, likewise were sent to appellants for their use in California. Said cards showed the name of appellants *as agents of said appellee company.*" (Their emphasis; App. Br. p. 5.)

Appellants' Evidence.

"Business cards of said defendant (Griesedieck) were sent to plaintiffs in California for use of the latter in California. Said cards show the names of plaintiffs as agents of (Griesedieck)." [Tr. p. 74.]

Appellee's Evidence.

"Cavanagh Printing Company printed large numbers of such blank business cards, with the Stag or Hyde Park trade-mark on them, for delivery in various parts of the country to distributors . . . In all such instances the business cards were blank except for the printed trademark." [Tr. p. 121.]

"The business cards sent by the printing company in

Appellants' Evidence.

Appellee's Evidence.

accordance with my direction, and in response to this request of Reed LeVecke, were blank except for the colored trademarks . . ." [Tr. p. 129.]

"I am employed by the Cavanagh Printing Company . . . I was in charge of the (Griesedieck) account and responsible for orders received from that company . . . These cards were blank except that the Hyde Park '75' beer trade-mark was printed on one thousand of them and the Stag beer trade-mark was printed on the other thousand. There was no other printing on the cards when they were mailed to (the plaintiffs)." [Tr. p. 120.]

(5) "Appellee (Griesedieck), was listed in the Central section of the telephone directories and the classified directories, issued by the Pacific Telephone Company in the County of Los Angeles, California." (App. Br. p. 5.)

Appellants' Evidence.

Appellee's Evidence.

"The said defendant (Griesedieck) is, and has been since 1952, listed in the Central section of the

"(Griesedieck) did not at any time cause its corporate name to be listed in any telephone directory in

Appellants' Evidence.

telephone directory and the Classified directory of the Pacific Telephone and Telegraph Company in the County of Los Angeles, State of California . . ."

Appellee's Evidence.

California; nor did (Griesedieck) at any time have knowledge of said listing; nor did (Griesedieck) at any time authorize the (plaintiffs) to list the corporate name of (Griesedieck) in any telephone directory. (Griesedieck) did not pay the cost of any such listing and if the listing was done, it occurred without the knowledge or consent of said Company." [Tr. pp. 134-135.]

(6) "Appellee sent out advertising matter to appellants, directed appellants on how to carry out their sales programs to increase the sale of appellee's products [Tr. pp. 70, 89, 97] and appellee advertised its products throughout the State of California. (App. Br. p. 4.)

Appellants' Evidence.

"That the said defendant (Griesedieck) at all times directed plaintiffs how to advertise and sell defendant's beer products and controlled the prices at which its beer products were sold in the State of California." [Tr. p. 70.]

Appellee's Evidence.

"From time to time, the company sold or furnished the plaintiffs various items of point-of-purchase advertising material. These accompanied merchandise being shipped to plaintiffs by railroad carrier, and title to all such material passed to plaintiffs upon delivery to the carrier in Missouri and Illinois. The subse-

Appellants' Evidence.

Appellee's Evidence.

quent use of the material in California by the plaintiffs was at their sole discretion." [Tr. pp. 31-32.]

"The plaintiffs, as a wholesaler and independent distributor of this defendant's products in California, sold beer to such wholesale and retail outlets as they chose to obtain. The plaintiffs purchased beer on their own account as principals . . . (and) resold on their own account the beer which they had purchased from this defendant; they had sole responsibility for fixing prices on sales by them and for the billing and collection of their accounts, without any control or supervision by this company. This company did not require the plaintiffs to maintain any records for it, to collect any data, or to file any reports with it with respect to the plaintiff's operation of their said business or with respect to their disposition of the beer sold by this defendant to them." [Tr. pp. 27-28.]

(7) "The business done by said appellee in the State of California was a substantial part of its business, and because of the business done in California by said appellee, it regarded California as one of its chief markets." (App. Br. p. 67.)

Appellant's Evidence.	*Appellee's Evidence.*
"That the business done by said defendant in the State of California was a substantial part of its business, and because of the business done in California by the said defendant, the latter regarded California as one of its chief markets." [Tr. p. 70.]	"During the period 1950 to 1954 the volume of shipments by (Griesedieck) to California was less than one (1) per cent of the total sales of said company in each of said years." [Tr. p. 125.]

These erroneous statements, inferences, and conclusions, do not, by any means, cover all of such which are contained in Appellants' statement of "Facts," but to further itemize them and to set out the rebutting evidence would make this brief unnecessarily prolix.

It requires but a brief perusal of the evidence in affidavit form to conclude that there are few "Facts" contained under that heading in appellants' brief.

(e) The Evidence as It Related to Carling Brewing Company Incorporated.

The District Court made its order quashing service of summons and complaint upon Carling Brewing Company Incorporated upon evidence which showed that:

(1) At no time has Carling Brewing Company Incorporated (hereinafter referred to as Carling)

sold any of its merchandise to the plaintiffs, or to any other persons, firms or corporations in the State of California or elsewhere through the plaintiffs, either directly or indirectly. [Tr. p. 52.]

(2) All business done by Carling with respect to purchasers located in California was and is done in the following manner:

(a) Orders from purchasers in California for merchandise manufactured by Carling are placed with Carling upon written order blanks and are subject to acceptance only at Cleveland, Ohio. [Tr. pp. 52-53.]

(b) All shipments of merchandise destined for California originated at the Cleveland, Ohio, plant of Carling and such sales were and are made and billed f. o. b. Cleveland, Ohio. [Tr. p. 53.]

(c) Title to merchandise of Carling sold to California purchasers passes to such purchasers at the time of delivery by Carling to the railroad common carrier in Cleveland, Ohio. [Tr. p. 53.]

(d) All invoices and statements relating to such sales were and are mailed from the Cleveland office of Carling direct to the California purchasers of Carling products. [Tr. p. 53.]

(e) All the California purchasers of Carling's products were and are wholesale distributors of Carling's products in California. [Tr. p. 53.]

(f) California wholesale purchasers of Carling's products were in all instances responsible for and paid all transportation charges from Cleveland, Ohio, to the destination. [Tr. p. 53.]

(g) Carling maintained and maintains a West Coast Regional representative, who had and has desk space in a Los Angeles office. Telephone listings were maintained at this address in the name of Carling. The regional representative has six field representatives working under his direction on the West Coast, and four of these spend a substantial amount of their time in California. [Tr. p. 54.]

(h) The regional representative and the field representatives engage in the following activities: call upon wholesale distributors of Carling's products for the purpose of examining records, and making recommendations to encourage sales efforts; accompany sales representatives of the distributors in visiting customers of the distributors, but they do not solicit orders or sales from these customers, the purpose of their visits being the promotion of the good will of the company. [Tr. pp. 54-55.]

(3) That Carling has never done any of the following acts:

(a) Maintain an inventory or stock of goods in the State of California, or fill orders from a stock of its beer and ale in California. [Tr. p. 56.]

(b) Have any salesmen or other employees accepting orders for Carling in the State of California. [Tr. p. 56.]

(c) Fix prices for its merchandise in California, nor approve sales in California; acceptance of orders from California was made in Cleveland, Ohio, and prices for the company's merchandise were established only in Cleveland. [Tr. p. 56.]

(d) Ship its merchandise to any purchaser in California on a contingent basis. [Tr. p. 56.]

(e) Ship its products to California, or elsewhere, by any transportation means owned or leased by it. [Tr. p. 57.]

(f) Make local deliveries within California of its products in any manner whatsoever. [Tr. p. 57.]

(g) Maintain a bank account in the State of California; [Tr. p. 57.]

(h) Make collections or receive any payments for its merchandise within the State of California. [Tr. p. 57.]

(i) Make any purchases within the State of California of ingredients, goods or supplies relative to its products. [Tr. p. 57.]

(j) Lend any money or have any interest in any of the independent wholesale distributors handling the merchandise of Carling within the State of California. [Tr. p. 57.]

(k) Lend any money to the plaintiffs or have any business relation with the plaintiffs either in the State of California or elsewhere. [Tr. p. 57.]

(l) Have any officer resident in California or other employee or agent in California authorized to accept service of process upon it. [Tr. p. 57.]

(4) None of the activities of Carling Brewing Company, or of any of its employees or representatives in the State of California, have any relationship to nor have they given rise to the liabilities sued upon by the plaintiffs as stated by the plaintiffs in their complaint [Tr. pp. 55-56], nor was either of the plaintiffs ever an officer or employee of Carling. Neither plaintiff ever served Carling in the State of California, or elsewhere, as agent, distributor, or in any other capacity whatsoever. [Tr. pp. 53, 54.]

ARGUMENT.

THE GRIESEDIECK COMPANY.

Summary of the Argument.

The Griesedieck Company was engaged solely in interstate commerce, and the California statutes do not permit service upon the Secretary of State as substituted service in such situations (Cal. Corp. Code, Sec. 6300), and for this reason the Order of the District Court must be affirmed.

Even if California Corporations Code, Section 6300, did not bar service of summons on the Secretary of State in this case, the Order of the District Court must still be affirmed, as the California statutes do not permit such substituted service on corporations which have withdrawn from doing interstate business in California, permitting it only in the case of withdrawals from intrastate business. (Cal. Corp. Code, Sec. 6504.)

In such circumstances this court need never reach the merits of the case in order to affirm the District Court.

But even should the merits be considered, the District Court must still be affirmed because appellants' entire case is based upon evidence as to which there was substantial conflict. When these controverted questions of fact are construed in the light most favorable to appellee Griesedieck, as they must under Rule 52(a) of the Federal Rules of Civil Procedure (*United States v. Comstock Extension Mining Co., Inc.*, 214 F. 2d 400, 403 (9th Cir., 1954)), the result is that appellants have no case.

For the theories of appellants' appeal are that (1) Griesedieck "solicited" orders and, (2) because the appellants did certain acts on their own part, without authority from and knowledge of Griesedieck, these acts bind Griesedieck, and therefore it may be "found" in California.

These theories are fallacious for the reasons that (1) Griesedieck did not solicit orders in California; (2) even if Griesedieck had solicited orders, this is not sufficient under California law upon which to base a finding of doing business because solicitation alone has never been held enough in California, and for the further reason that solicitation must be continuous and systematic in order to bring the foreign corporation within the state; (3) California law is settled that a resident of the state, by his unauthorized acts which purport to make him an agent, cannot bind an out of state corporation. (*Jameson v. Simonds Saw Co.,* 2 Cal. App. 582 (1906); *Smith & Wesson, Inc. v. Municipal Court,* 136 Cal. App. 2d ..... (136 A. C. A. 757, 763 (1955).)

Finally, appellants case must fail because even should Griesedieck be found to be "doing business" under the California law, such a finding would be violative of due process under the rule of *International Shoe Co. v. Washington,* 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945).

I.

California Statutes Do Not Permit Service of Summons and Complaint on Foreign Corporations by Service on the Secretary of State Where Such Corporations Are Engaged Solely in Interstate Commerce.

A. Griesedieck Was Engaged Solely in Interstate Commerce, in so Far as Its Activities Related to California.

The rule has long been established that the mere shipment of goods or products into a state in fulfillment of a contract of sale constitutes interstate, as distinct from intrastate, commerce.

> "Manifestly, the sales, followed by the delivery of the pianos in this state, upon orders sent from this state to the appellant in the state of Illinois, are transactions in interstate commerce and beyond the scope of the statute."
>
> *W. W. Kimball Co. v. Read,* 43 Cal. App. 342, 345 (1919);

See also,

> *Charlton Silk Co. v. Jones,* 190 Cal. 341 (1923);
>
> *Indian Oil Refining Co., Inc. v. Royal Oil Co.,* 102 Cal. App. 710 (1929).

Evidence before the District Court bearing on the interstate nature of Griesedieck's business in California was uncontradicted. This evidence showed that Griesedieck's business, in so far as it related to California, consisted of receiving, accepting, and filling orders at its plants in Illinois and Missouri, and shipping the products to California. The evidence showed that Griesedieck had no further control, responsibility, or title over or in the products after they left its plants.

Such activity was manifestly interstate commerce.

> "There [was] evidence that plaintiff was not distributing oil in California, that beginning with January, 1926, it had no stock of any kind on the coast, that it shipped only in carload lots, from Illinois, to customers here, to whom the goods were sold . . . The inference could fairly be drawn, from the evidence, that since the filing of the certificate of withdrawal from intrastate business, the plaintiff has been engaged wholly in interstate commerce."
>
> *Indian Oil Refining Co., Inc. v. Royal Oil Co.,* 102 Cal. App. 710, 715 (1929).

> "The mere shipping of products into the forum in interstate commerce does not constitute doing business in the forum. Cannon Mfg. Co. v. Cudahy Packing Co., *supra,* even if the plaintiff seeking to establish jurisdiction is the vendee and the action relates to the products sold. (Emery v. Adams, 6 Cir., 179 F. 2d 586.)"
>
> *Favell-Utley Realty Co. v. Harbor Plywood Corp.,* 94 F. Supp. 96, 99 (D. Ct., N. D. Calif., 1950).

See also,

> *Dahnke-Walker Mill Co. v. Bondurant,* 257 U. S. 282, 290, 66 L. Ed. 239, 243, 42 S. Ct. 106 (1938).

B. California Statutes Permit Service of Summons and Complaint Upon Foreign Corporations by Service on the Secretary of State Only When the Foreign Corporation Is Doing Intrastate Business in California.

The conditions under which California statutes permit service of summons upon foreign corporations are contained in Section 6501 of the Corporations Code of the State of California.

Section 6501 provides:

> "If the agent designated for the service of process be a natural person and cannot be found with due diligence at the address stated in the designation or if such agent be a corporation and no person can be found with due diligence to whom the delivery authorized by Section 6500 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act, or if no agent has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may make an order that service be made by personal delivery to the Secretary of State or to an assistant or deputy secretary of state of two copies of the process together with two copies of the order, except that if the corporation to be served has not filed the statement required to be filed by Section 6403 then only one copy of the process and order need be delivered but the order shall include and set forth an address to which such process shall be sent by the Secretary of State."

These conditions, found in Section 6501 of Part II of Chapter 4, are, however, expressly made inapplicable to corporations engaged solely in *interstate* commerce by Section 6300, also in Part II. Section 6300 provides:

> "This part does not apply to corporations engaged solely in interstate or foreign commerce."

Appellee Griesedieck does not assert that California could not, within the limits of due process, provide for such service on foreign corporations; but it does assert that the State has not done so, that the state has set

the outside limits of such service *within* the limits of due process, and has set those outside limits on corporations doing an intrastate business.

No California cases have been found which have discussed this section, and it would appear that those cases which contain language to the effect that it is immaterial whether the business of the corporation in the state in *inter* or *intra*state in character, are to that extent questionable. (See, *Fielding v. Superior Court,* 111 Cal. App. 2d 490, 496 (hear. den. 1952); *Jeter v. Austin Trailer Equipment Co.,* 122 Cal. App. 2d 376, 381 (hear. den. 1954).)

In the *Fielding* case, *supra,* the Court said that such a distinction poses only the question of a burden upon commerce.

This view of the distinction would be correct, were it not for the fact of the existence of the section.

For had it been the intent of the legislators merely to restate the constitutional prohibition against burdening interstate commerce the section would amount to a mere redundancy.

Moreover, it would have been but a simple exercise in statutory drafting to have restated this prohibition, had that been the intent, rather than use the language appearing in the section.

The cases which question the distinction, moreover, may be distinguished on the ground that due to the nature of the relationship of the foreign corporations to the State of California in those cases, and the character of activities carried on therein, that under the broad rule of *International Shoe Company v. Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), where the concept

of intrastate business was broadened, the defendants there were doing an intrastate business. (See *Bomze v. Nardis Sportswear,* 165 F. 2d 33 (2d Cir., 1948).)

That the Corporations Code affirmatively requires a corporation to be engaged in intrastate business in California before service can be effected upon it by serving the Secretary of State is apparent from Section 6504 of the Corporations Code, when construed with Section 6300.

Section 6504 provides:

> "A foreign corporation *which has transacted intrastate business in this state* and has thereafter withdrawn from business in this state may be served with process in the manner provided in this chapter in any action brought in this state arising out of such business, whether or not it has ever complied with the requirements of Chapter 3 of this part." (Emphasis ours.)

If a corporation doing only interstate business within the State may be served by service of process on the Secretary of State, and if, in addition, a corporation which subsequent to withdrawal from intrastate business can be served in the same manner, then there is no distinction between the two situations and the presence of the qualifying clause in Section 6504 would be meaningless. In other words, if in both types of situations the foreign corporation may be served, then the fact of withdrawal would seem to have no significance; but the fact of withdrawal from intrastate business assumes significance and consistency with Section 6300 if the language was meant to exempt the withdrawing company which was thereafter engaged solely in interstate business.

C. California Cases Have Recognized the Distinction.

Several California cases, as noted above, have professed to find no basis in the distinction other than the question of burdening commerce. As noted, under the facts of those cases, they must be construed in the light of the *International Shoe* case as broadening the base of intrastate activities.

Nevertheless several California cases have recognized the importance of the distinction in that intrastate activities provide the basis of jurisdiction.

Thus, in *Oro Navigation Co. v. Superior Court,* 82 Cal. App. 2d 884, 888 (hear. den. 1948), the Court said:

> "The fact that the Triumph Company had *transacted intrastate business was the factual ground* upon which it was decided that service of plaintiff's summons in that action on the designated California agent, the Secretary of State, was a valid service." (Emphasis ours.)

Again, in *Proctor & Schwartz v. Superior Court,* 99 Cal. App. 2d 376, 381-382 (1950), the Court issued a peremptory writ of mandate directing the trial court to set aside its order denying the motion to quash service of summons on a foreign corporation by service on the Secretary of State. The Court set forth the facts of the manner in which the foreign corporation was operating and said:

> "The affidavit states, further, that at no time mentioned in the affidavit did the corporation maintain a sales force, or any salesmen, in California, and at no times therein mentioned could any employee or representative of said corporation in California collect money; that the purchase price for all ma-

chinery sold in California was received by the corporation in Philadelphia; that it maintained no bank account in California; that all statements and invoices sent to the purchaser in California were sent from Philadelphia; that no credit was extended to a purchaser in California on behalf of the corporation by any person in California and that it borrowed no money in California. The affidavit concludes: 'That affiant is informed and believes, and therefore states, that at all times herein mentioned said corporation was not engaged in doing business in . . . California and was not engaged in doing an intrastate business in . . . California; that it did not enter into any contracts in . . . California and did not deliver and install machinery in the factory of said Consolidated Chemical Industries, Inc., in the County of San Mateo, State of California, or otherwise.'

* * * * * * * *

"The presence of Crouse in Consolidated's plant was in pursuance of the contract, which contract unquestionably constituted a transaction in *interstate* commerce. (*Charlton Silk Co. v. Jones,* 190 Cal. 341 (212 P. 203); *W. W. Kimball Co. v. Read,* 43 Cal. App. 342, 345 (185 P. 192); *Indian Refining Co. v. Royal Oil Co., Inc.,* 102 Cal. App. 710, 714, 716 (283 P. 856).)" (Emphasis ours.)

The evidence shows, and the District Court found, that Griesedieck was engaged solely in interstate business in California, and as the California statute affirmatively prohibits service on the Secretary of State in an action against such a corporation, the Order of the District Court must be affirmed.

II.

California Statutes Permit Service of Summons and Complaint on Foreign Corporations Which Have Withdrawn From the State Only When Such Corporations Were Formerly Doing Intrastate Business.

If this Court follows the California statute on service upon foreign corporations, Section 3600 would preclude the service attempted here.

But even if Section 3600 did not so preclude the service of process in this case, California permits service on the Secretary of State where the corporation has withdrawn from business in California only in those cases where the corporation was formerly engaged in *intra*state business. (*Cal. Corp. Code,* Sec. 6504, *supra.*)

As has been shown in our Statement of the Case, Griesedieck sold its brewing assets, equipment, real estate, plants, and inventory on November 1, 1954, prior to the filing of the complaint, and since that date has not engaged in the brewing business, and has not engaged in business *of any kind* with respect to California.

Thus, Griesedieck having ceased to do any business in California prior to the service of process, as pointed out above, the California statute does not permit service such as was attempted here, but permits it only as to corporations formerly engaged in *intra*state business.

This is pointed out in 5 Stanford L. Rev. 503, 510, in an article entitled *"Suing Foreign Corporations in California"* where it is stated:

> "But perhaps this foreign corporation engaged solely in interstate commerce ceased doing business here before it was served with court process. Can it avoid suit in this manner? Apparently it can,

since the California statutes provide for service only on withdrawn corporations which have transacted *intrastate* business. This requirement is even more strict than might appear, since the transaction of intrastate business is defined by statute (California Corporations Code, Section 6203) as 'entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce.' "

Hence, even if Section 6300 be held not to be a bar to this service, as Griesedieck was conducting only interstate business within the state, and as it had withdrawn completely before service of process, the attempted service was not valid under California statutes, and the Order of the District Court must be affirmed.

III.

Even If Sections 6300 and 6504 Do Not Constitute a Bar to This Service of Summons and Complaint, California Requires Much More Contact With the State to Find a Foreign Corporation Is "Doing Business" Than Griesedieck Had Here.

A. Under the California "Doing Business" Requirement the Test Is Not Whether There Is Any Contact, but Whether or Not the Combination of Local Activities—Considering Their Manner, Extent, and Character—Is Sufficient to Support a Finding of "Doing Business."

It is a fundamental and undisputed requisite under the United States Constitution that before a state can authorize service of process upon the statutory agent of a foreign corporation and thereby acquire jurisdiction over that foreign corporation, the corporation must be "doing business" within the state. (*Riverside etc. Mills v. Menefee,* 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910; *West Publishing Co. v. Superior Court,* 20 Cal. 2d 720 (1942).)

In the application of the "doing business" test in California, it is clear that just *any* activity or conduct within the state by the foreign corporation will not, of itself, be sufficient to satisfy this requirement. (*West Publishing Co. v. Superior Court, supra.*)

The California Supreme Court, in the *West Publishing Company* case, set forth the approach to such cases as follows:

> ". . . it is the combination of local activities conducted by such foreign corporation—their manner, extent and character—which becomes determinative of the jurisdictional question." (*Id.,* p. 728.)

B. California Demands More Contact Than the Appellee Griesedieck Had in the State Before the "Doing Business" Jurisdictional Requirement Is Satisfied.

Appellants appear to have two theories which they assert are sufficient to show that Griesedieck was "doing business" under the California decisions.

The first of appellants' theories is that while Mr. Jones was in California he "solicited" orders for Griesedieck. And the second theory is that Griesedieck was doing business in California because the plaintiffs, on their own part and without authority, did certain acts which sound of agency.

On neither theory can Griesedieck be said to have been doing business in California.

Evidence adduced before the District Court showed that Griesedieck merely sold its products to two distributors in California, the contracts being accepted in Illinois and Missouri. Thereafter the products were delivered to a common carrier, at which point title passed to the plaintiff's and to the other distributor.

The same procedure was followed with regard to advertising material furnished the plaintiffs by Griesedieck. Following its delivery to the carrier, the manner and extent of, and responsibility for, its use rested solely on the plaintiff's discretion.

Aside from the sale of its products to independent distributors in California, the only contact Griesedieck had with California over the period involved was made in the four visits of Mr. Edward Jones, then president of Griesedieck.

Taking first those cases relied upon by the appellants, and in which the foreign corporation was held to be doing business in California, it is readily apparent that they require a great deal more contact with the forum than that presented here in order to make service upon a foreign corporation by serving the Secretary of State effective.

In *Jeter v. Austin Trailer Equipment Co.,* 122 Cal. App. 2d 376, 388-389 (hear. den. 1954), the foreign corporation (1) had an agent in the state who solicited continuously and systematically; (2) kept merchandise in California; (3) filled orders from local stocks; and (4) contributed to payment of local agent's rental; and though the corporation tried to remove itself by altering some of these factors, it was still retaining the local agent who solicited continuously and systematically.

In the case at bar Griesedieck (1) did not have an agent in the state; (2) did not keep merchandise in California; (3) did not fill orders from local stock; and (4) did not contribute to payment of its distributor's rental or to any of the expenses of its distributor. [Tr. pp. 29-30.]

In *Liquid Veneer Corp. v. Smuckler,* 90 F. 2d 196, 200 (C. C. A. 9th, 1937), the foreign corporation (1) shipped merchandise in bulk into California and warehoused it in California for present and future use in filling orders; (2) filled orders in California from warehoused stock.

In the case at bar Griesedieck (1) did not ship merchandise to California in bulk except as to fill orders from independent distributors, and did not warehouse any of its products in California for use in filling orders; (2) did not fill California orders from stock warehoused in California. [Tr. pp. 29-30.]

In *Thew Shovel Co. v. Superior Court,* 35 Cal. App. 2d 183, 186 (1939), the foreign corporation (1) fixed prices; (2) approved all sales; (3) sold goods in California on consignment; (4) agreed to supply engineers to install equipment; and (5) required distributor to make weekly reports to the manufacturer.

In the case at bar Griesedieck (1) did not fix prices for sales in California; (2) did not approve any sales made by the independent distributors in California; (3) did not supply engineers or any other professional help to the distributor; and (4) did not require the distributor to make weekly or any other reports to it. [Tr. pp. 27-30.]

In *Sales Affiliates, Inc. v. Superior Court,* 96 Cal. App. 2d 134, 214 P. 2d 541 (1954), the foreign corporation (1) had a salesman who covered the western states soliciting and taking orders from wholesalers and jobbers; (2) required retail purchasers of its products to enter into a license agreement; (3) fixed the minimum prices to be charged under the license agreement; and (4) required the retail users of its products to covenant not

to use products which infringed on the corporation's patents.

In the case at bar Griesedieck (1) did not have salesmen or a salesman who solicited in California, or took orders in California from wholesalers and jobbers; (2) did not require retail purchasers of its products to enter into any kind of agreement with it; (3) did not fix minimum prices or fix prices in any manner; and (4) did not require covenants from retailers as to use of other products or as to any other matter whatsoever. [Tr. pp. 27-30.]

In *Fielding v. Superior Court,* 111 Cal. App. 2d 490, 244 P. 2d 968 (1952), the foreign corporation (1) retained title to the goods shipped to California until the goods were sold; (2) warehoused the goods in California; (3) set the prices on the ultimate sales; (4) required reports of stock on hand each month; and (5) agreed to insure the distributor against any action on behalf of the Federal Government under the Food, Drug, and Cosmetic Act.

In the case at bar Griesedieck (1)did not retain title to goods shipped to California; (2) did not warehouse goods in California; (3) did not set prices on ultimate sales; (4) did not require reports of stock on hand each month, or reports of any kind or nature whatsoever; and (5) did not agree to insure the distributor against actions brought against it. [Tr. pp. 27-30.]

In *Duraladd Products Corp. v. Superior Court,* 134 Cal. App. ..... (134 A. C. A. 266, 1955), the foreign corporation (1) set up a distributor who participated in the final stages of manufacture of the corporation's product, (2) continued to supply technical advice concerning

the stage of manufacturing in which the distributor participated, (3) supplied technical advice as to necessary retooling, and (4) agreed to make periodic visits to the state for the purpose of technical consultation.

In the case at bar none of these elements is present. Moreover, the distributor there held itself out as agent of the foreign corporation with the apparent consent and knowledge of the foreign corporation. Such is not the case here, as will be shown below.

On the other hand, in situations similar to the one at bar, California Courts have found the corporation not to be doing business in the state.

In *Martin Bros. Elec. Co. v. Superior Court,* 121 Cal. App. 2d 790 (1953), the foreign corporation offered affidavits showing that it maintained no office, warehouse, or stock of materials in California; that all persons and business establishments in California handling its products were independent of and had no financial interest in it; that the corporation had no interest in these or any other business establishments in California, and had no control whatsoever over any such establishments or persons.

The foreign corporation further showed by affidavits that the corporation shipped no merchandise to California on consignment or on any other basis whereby ownership would remain in the corporation; that all prices quoted were prices in effect at the factory in Cleveland and that all shipments to California or anywhere else were made at the factory to agents or carriers specified by the buyers of the merchandise.

The corporation further showed by affidavit that it had no salesmen living in California for at least two years and did no selling, purchasing, manufacturing, or

other business within California; that the corporation never designated an agent for service of process in California; and had no bank accounts therein, and no real or personal property within the state.

The Court, on these facts, granted a writ of prohibition to restrain further proceedings, and noted:

> "It has been held that a foreign corporation may be doing business within the state where products manufactured by the corporation are distributed and sold in the state, even though the distributors are independent. (*Kneeland v. Ethicon Suture Laboratories, Inc.,* 118 Cal. App. 2d 211 (257 P. 2d 727); *Fielding v. Superior Court,* 111 Cal. App. 2d 490, 494 (244 P. 2d 968); *Sales Affiliates, Inc. v. Superior Court,* 96 Cal. App. 2d 134 (214 P. 2d 541).) But we have found no case holding that these facts, standing alone, are sufficient to make the foreign corporation amenable to process in this state. In the Kneeland case it was established, among other things, that the corporation was engaged in its own sales promotion work in the state. In the Fielding case the corporation had agreed to insure the distributor against action on behalf of the federal government under the Food, Drug and Cosmetic Act and the corporation set the retail sales prices and required from the distributor a report of stock on hand each month. In the Sales Affiliates case the distributor operated through licensing agreements granted by the corporation and thereby controlled its activities."

In similar factual circumstances, the Court in *Estwing Manufacturing Co. v. Superior Court,* 128 Cal. App. 2d 259 (1954), granted a writ of prohibition to restrain further proceedings. The facts of that case are not even

so compelling as those here, for as the dissent pointed out, the foreign corporation there had a continuous and established relationship with the ultimate purchasers of its products, while Griesedieck did not.

We submit that the Martin and Estwing holdings are dispositive of the appellants' contentions in this case.

C. Griesedieck Did Not Solicit Orders in California.

Appellants assert that Griesedieck's president, "on numerous occasions" was sent to California "to conduct sales tours throughout the state," and that he "personally solicited business for said appellee company."

Such broadly inaccurate statements appear throughout appellants' brief, as is noted in the Statement of the Case, but those noted above assume added importance in view of the "solicitation" theory by which appellants seek to bring Griesedieck within the jurisdiction of California Courts.

The evidence before the District Court clearly indicated that over the five year period during which the plaintiffs bought and distributed Griesedieck's products, Mr. Edward Jones, then president of Griesedieck, came to California on but four occasions. [Tr. p. 123.]

The purpose of these trips, as the evidence before the District Court showed, was not to make "sales tours," but they were made at the behest and suggestion of Mr. William R. LeVecke as a benefit to the plaintiffs' independent business as distributor. [Tr. p. 123.]

The various business calls described in the affidavits of William R. LeVecke, and redescribed in the plaintiffs' statement of "Facts," were made at the plaintiffs' own request as a means of promoting their good will with

their customers. [Tr. p. 124.] The president of Griesedieck did not solicit any orders for sales of beer in California, nor did he make any sales of beer in California. [Tr. p. 124.]

It is thus seen that the acts which appellants rely upon for their solicitation theory were not solicitations at all, or at least in the sense in which the California cases have used the term.

Solicitation, under the California cases which have discussed such activity, means *continuous* and *systematic* activity in actually soliciting orders (*Jeter v. Austin Trailer Equipment Co.,* 122 Cal. App. 2d 388; *Sales Affiliate, Inc. v. Superior Court,* 96 Cal. App. 2d 134 (1954); the term does not in any sense comprehend the activities of Mr. Jones.

The appellants' theory of solicitation, indeed, is analogous to and of the same fallacious character as its theory of agency, dealt with below, to the effect that the acts of the appellants in soliciting business for and improving the condition of their own independent distributorship, by reason of the fact that Mr. Jones accompanied Mr. LeVecke in visting LeVecke's customers, constituted solicitation on the part of Griesedieck simply because Griesedieck would benefit if LeVecke's sales were improved.

Since Edward Jones did not solicit business, and since his activity, such as it was, was not continuous and systematic, the appellants' theory of gaining jurisdiction here by reason of solicitation of business must fail.

As the Court in the *Fielding* case conceded:

> "It is true that the few isolated trips to this state by the representative of the corporations are not

sufficient to give the court jurisdiction. (*Proctor & Schwartz, Inc. v. Superior Court,* 99 Cal. App. 2d 376 (221 P. 2d 972).)"

Fielding v. Superior Court, 111 Cal. App. 2d 490, 495.

1. Even if Jones had Solicited Business, his acts were not such as to Constitute Doing Business Under the California Cases, Which have Never held that Solicitation Alone is Sufficient.

There is. of course, language in the California cases to the effect that solicitation, without more, is sufficient to constitute doing business in the state.

But analysis of the cases indicates that such language is not the holding in those cases, and that the Courts require *something more* than mere solicitation.

Thus, appellants cite *Koninklijke Luchtvaart Maatschappij v. Superior Court,* 107 Cal. App. 2d 495, 237 P. 2d 297 (1951), and quote the following language from that opinion:

> "In the more recent decisions, solicitation, *without more,* constitutes 'doing business' within a state when the solicitation is a regular, continuous and substantial course of business." (Appellants' emphasis; *Id.,* p. 500.)

However, the facts and the rule of that case require that something additional be shown.

In the *Koninklijke* case the corporation had two offices within California, in one of which it had three or four employees constantly engaged in the solicitation of business and still so engaged at the time the action was brought. In the other office, which had been continu-

ously maintained since 1938, the corporation employed some 24 persons who administered contracts of purchase, which purchases were in excess of $1,000,000.00 annually. The corporation furthermore maintained a bank account in the state and owned automobiles within the state.

The *Koninklijke* case, therefore, does not support the asserted rule.

Furthermore, the cases cited by the *Koninklijke* case as supporting the rule (*Frene v. Louisville Cement Co.,* 134 F. 2d 511, 146 A. L. R. 926; *Perkins v. Louisville & N. R. Co.,* 94 Fed. Supp. 946 (D. C., Dist. Col., 1951), do not do so.

In the *Frene* case the Court had the following to say:

> "But it is not necessary to take the final step in repudiation (of the solicitation *plus* rule) in this case, since the facts are sufficient to bring it within the 'solicitation plus' rule. Lovewell's activities on behalf of defendant were not limited to 'mere solicitation' . . . he did more, did it regularly, and did it with defendant's knowledge, consent and approval. He not only solicited and forwarded orders. He visited the jobs where defendant's product was being used, made suggestions for solving difficulties which arose in its use, received complaints, forwarded them to the home office and, while he had no authority to make final settlements or contractual adjustments, aided generally both in preventing and in clearing up misunderstandings and difficulties . . . Lovewell testified that in some instances defendant expressly instructed him to visit specific jobs where its product was being used and to assist in straightening out whatever complications had arisen or might arise. Apparently this happened repeatedly and Love-

well considered this work a part of his employment when he was so instructed."

The *Frene* case thus expressly states that it was not repudiating the 'solicitation plus' rule, and the facts bear out that statement.

In the *Perkins* case, also cited by the *Koninklijke* opinion and by appellants for the same proposition, we find the following language:

> ". . . it is the view of this court that under California law the *continued solicitation* of business by a *foreign corporation maintaining a regular office within this state constitutes doing business* and renders the foreign corporation present in the state of California and amenable to its process." (Emphasis ours.)
>
> *Perkins v. Louisville & N. R. Co.,* 94 Fed. Supp. 946, 949.

In neither case therefore was the rule expressed that solicitation *without more* constitutes doing business in the forum.

Appellants cite *Jeter v. Austin Trailer Equipment Co.,* 122 Cal. App. 2d 276, 265 P. 2d 130 (1953), as supporting the rule. There, however, the solicitation activities of the corporation's employee were regular, continuous, and persistent, which might support the asserted rule when rendered with those qualifications, but would not support it here where the alleged solicitation was merely casual and extremely intermittent.

Moreover, in the *Jeter* case it was shown that the corporation had only recently warehoused its merchandise in California, filled orders from its local stocks, and contributed to the agent's rental.

Appellants appear to cite *Woodworkers Tool Works v. Byrne,* 191 F. 2d 667 and 202 F. 2d 530 (1951), as supporting the rule, but that case does not discuss solicitation at all.

D. Griesedieck Was Not Doing Business in California by Reason of the Acts of the Levecke Company or of the Leveckes in Holding Themselves Out as Agents.

It is significant that in this case, unlike any case cited by appellants, it is not a third party which is suing the foreign corporation and maintaining that it was doing business within the state because it had agents or activities there.

Here it is the purported agent himself who asserts that because he did certain acts, holding himself out as agent and employee, that the foreign corporation was doing business there.

The essence of appellants' case in this regard is that by sending out business cards, which they say "showed the name of appellants *as agents of Griesedieck*" (App. Br. p. 5), and by their own acts of signing correspondence *as agents of Griesedieck,* and their own act of listing Griesedieck in the telephone directories, and their own acts of advertising and soliciting orders for Griesedieck products, they thereby brought Griesedieck within the State.

The evidence shows, in spite of appellants' bland assertion that the business cards "showed the name of appellants as agents of said appellee company," that such cards were shipped to the appellants *void* of printing except for the colored trademarks. By their own unauthorized act of printing Griesedieck's name upon the cards, appel-

lants assert that they may bring Griesedieck into California.

The evidence shows, in spite of appellants' irrelevant assertion that they signed stationery as agents and employees of appellee Griesedieck, that they were not so authorized to use any stationery shipped to them, and that such stationery as was shipped to them was at their request, and done without the knowledge or authority of responsible officers of Griesedieck. By their own request for stationery, and by their own unauthorized acts of signing said stationery as agents and employees of Griesedieck, appellants assert that they may bring Griesedieck into California.

The evidence shows, in spite of appellants' continued assertion in the affidavits and in their brief that Griesedieck shipped them sales delivery books and required them to be used on California sales, that such delivery books as were shipped were shipped at the request of appellants in order to provide a form for their own delivery books, that such delivery books as were shipped could only, as a strictly practical matter, be used in Missouri. For the books show on their face that that was the state of their intended use, there being provided thereon a section for the insertion of the Missouri liquor license number of the purchaser.

The evidence shows, in spite of appellants' continued assertion that such use was required by Griesedieck, that Griesedieck did not require such use, and did not even know that such use of the books was being made, if, indeed, it was, it being extremely unlikely that a California seller of beer would make deliveries on forms which contain a blank for the entry of a *Missouri* liquor license

number. Thus, by their own unauthorized acts of using such delivery books, appellants assert that they may bring Griesedieck into California.

Thus, in essence, appellants argument here is that they may literally lift themselves into Court by their own bootstraps, for since *they* have done these acts within the state, *ipso facto* the corporation has done them, and that therefore the corporation is within the state.

The adoption of such a rule would create obvious opportunities for injustice, and would permit any business in California to bring in a foreign corporation which had had any dealings with it. We submit that the asserted rule is against the policy of the statutes and the Courts, and is contrary to law.

In *Jameson v. Simonds Saw Co.,* 2 Cal. App. 582 (1906), where the Simonds Saw Company was a California corporation and the co-defendant, Simonds Manufacturing Company, was a Massachusetts corporation, the plaintiff brought an action in California for services rendered. The plaintiff there made an attempt similar to that of appellants' here to show jurisdiction by showing that the California corporation had printed on its stationery the name of the foreign corporation. The Court, at pages 578-588, had the following to say:

> "Another fact relied on by the plaintiff was that certain letterheads of the Simonds Saw Company were introduced in evidence, upon which was printed a list of articles of different manufactures in which it dealt, and underneath the name of the appellant was the word 'Agencies,' beneath which there were

printed several places of address in different states, the last of which was 'Simonds Saw Company, San Francisco, Cal.'

"The printing and use of these letterheads was the act of the Simonds Saw Company, and not of the appellant. The saw company could not thus constitute itself the agent of the appellant, nor would the knowledge of the appellant that it had so styled itself make the saw company its agent, or, in the absence of any showing that it had acted as such agent with its approval or assent, be the transaction of any business by the appellant. It is a matter of common knowledge that frequently the manufacturer of articles gives to some person or firm the exclusive right to sell such article within a designated territory, and that such person or firm styles itself the exclusive agent for the sale of such article. *The goods thus dealt in by the agent are purchased by him from the manufacturer, but the manufacturer is not doing business within that territory by reason of the sale of its wares by such self-styled exclusive agent."* (Emphasis ours.)

Since in the *Simonds* case it was a third person who attempted to bring the foreign corporation into the state by reason of the unauthorized acts of the purported agent, the case at bar presents even stronger facts, for it is here the "self-styled exclusive agent" himself to assert the presence of the corporation.

This rule of the *Simonds* case has been followed as recently as *Smith & Wesson, Inc. v. Municipal Court,* 136 A. C. A. 757, 763 (1955), and is dispositive of the appellants' contentions.

Since appellants' entire case is based upon these fallacious theories of agency and solicitation, which themselves are based upon conflicting evidence, the District Court must be affirmed unless its ruling was clearly erroneous.

United States v. Comstock Extension Mining Co., Inc., 214 F. 2d 400, 403 (9th Cir., 1954).

E. The So-Called "Substantial Benefits" Rule Is Not the Test of Jurisdiction.

Appellants assert, following some dictum in a few of the California cases that if the representation which a foreign corporation maintains in this state gives it substantially the same benefits it would enjoy by operating through its own office or paid sales force that it is "doing business" in the state.

Appellant relies upon:

Sales Affiliates v. Superior Court, 96 Cal. App. 2d 134, 214 P. 2d 541 (1950);

Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P. 2d 968 (1952);

Iowa Manufacturing Co. v. Superior Court, 112 Cal. App. 2d 503, 246 P. 2d 681 (1952);

Jeter v. Austin Trailer Equipment Co., 122 Cal. App. 2d 376, 265 P. 2d 130 (1953).

In all of these cases, as has already been noted, the corporation carried on substantial, continuous activities in the state, and the asserted rule is nothing more than dicta.

The fault of this test, aside from the fact that the California Supreme Court has never used it, is that it proves too much.

For example, a foreign corporation which had no contacts whatever in the State of California, and which sold its products in interstate commerce to a California concern which thereafter aggressively engaged in selling on their own part those products, obviously would be receiving substantially the same benefits as if "it maintained its own office or paid sales force" within the state.

But the cold fact remains that the foreign corporation could not be said to be present within the state. The same reasoning applies in the case at bar, and the asserted rule does not aid the appellants under the facts of this case.

IV.

Griesedieck Would Be Denied Due Process Were It Forced Under the Circumstances of This Case to Defend the Action in California.

A. Due Process Must Be Assessed Independently of the "Doing Business" Test.

Assuming, *arguendo,* that the California statutes permit the service attempted here, then, should Griesedieck be held to have been doing business in California, such a finding would be violative of due process.

For in spite of the language in some of the lower court decisions in California (see *Fielding v. Superior Court,* 111 Cal. App. 2d 490, 496, 240 P. 2d 968 (cert den. 344 U. S. 897, 1952)), the requirements of due process must be met independently of the "doing business" test.

> *Schmidt v. Esquire,* 210 F. 2d 908, 915 (7th Cir., 1954).

B. Due Process Requires an Estimate of the Inconveniences to the Corporation If Forced to Defend Away From Its Home.

The requirements of due process in situations where an *in personam* judgment is sought against a foreign corporation were set out by the United States Supreme Court in *International Shoe Co. v. Washington,* 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 102 (1945), where the court said:

> "(D)ue process requires . . . (that) he have certain minimum contacts with (the territory of the forum) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Under this approach:

> "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' is relevant in this connection. (Hutchinson v. Chase & Gilbert, *supra.*"
>
> *International Shoe Company v. Washington, supra,* at p. 317.

Hutchinson v. Chase & Gilbert, 45 F. 2d 139 (C. C. A. 2d, 1930), did not discuss due process, but was cited and apparently adopted by the court in *International Shoe* in its discussion of due process requirements. In the *Hutchinson* case a foreign corporation was sued in a New York State court. The defendant removed for diversity of citizenship and moved to set aside the service because it was not doing business within the state.

After a review of the contacts which the corporation had with New York, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, said:

> "There must be some continuous dealings in the state of the forum; enough to demand a trial away from its home.
>
> "This last appears to us to be really the controlling consideration, expressed shortly by the word 'presence,' but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state makes it reasonable to bring it before one of its courts . . . In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiff should go to Boston, than that the defendant should come here."

Due process, then, involves consideration of inconvenience to the corporation, which consideration would seem to be analogous to, if not the same, as, that made in a motion to change venue.

In this approach consideration of such factors as the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses should be made.

It is manifest that the defendant would be put to great expense should it be forced to defend the action in California.

The Griesedieck Western Brewery Company is no longer in existence; the company which succeeded it no longer engaged in the brewing business. Some of its employees, such as the former president, Mr. Edward Jones, are no longer connected with the succeeding organization. The corporate records which would have to be used in defending the action are not in California. The corporate officials and employees who would have to testify are not in California.

That it would be unfair and inconvenient to the corporation to disrupt its activities by bringing its officials to California to testify, that it would be unfair and unjust to force it to undergo the cost of bringing witnesses to California is only too obvious.

That it would pose problems of great difficulty for Griesedieck in securing attendance of witnesses—persons no longer connected with the corporation who for business or other reasons might well be reluctant to voluntarily come to California from St. Louis—is readily apparent.

On the other hand it is fair and reasonable, in view of the insubstantial contacts which Griesedieck had with California, that the plaintiff should go to the place where the defendant is to be found, to the place where the defendant's documents exist, and where plaintiff's witnesses are readily available and easily served with process.

In short, in the words of Judge Learned Hand, "It is fairer that plaintiffs should go to (St. Louis) than that the defendant should come here."

V.

In Removing the Action to the District Court, Appellees Did Not Waive Jurisdiction.

Appellants, in Specification of Errors, Number 4, assert that in removing the action from the Superior Court of California to the United States District Court the appellees waived the question of jurisdiction.

Appellants cite no authority for this proposition and do not even discuss it in their argument, apparently abandoning the point, or realizing the fallacy it states.

The proposition has been repeatedly rejected by the courts. In *Block v. Block,* 196 F. 2d 930, 932, 933 (7th Cir., 1952), it is said:

> "Defendant followed the statutory mode for removal by filing his certified petition therefor, with copy of the alleged process and the complaint attached thereto, and the requisite bond, all as provided by 28 U. S. C. A. §1446. It then became necessary for the District Court to examine his motion to dismiss for want of jurisdiction over the subject matter of the suit . . . His application for removal did not constitute a waiver of service. General Investment Co. v. Lake Shore & M. S. Ry. Co., 260 U. S. 261, 268, 43 S. Ct. 106, 67 L. ed. 244."

See also:

Hassler v. Shaw, 271 U. S. 195, 46 S. Ct. 479, 70 L. Ed. 900;

Wabash Western R. v. Brow, 164 U. S. 271, 279, 17 S. Ct. 126, 41 L. Ed. 431, 434.

Appellants' assertion is obviously contrary to the law and is of no avail to them here.

VI.

(CARLING BREWING COMPANY, INCORPORATED.)

California Has Not Exercised Jurisdiction Over Foreign Corporations Where the Cause of Action Sued Upon Arose Out of the State and Is Unrelated to the Business Done Within the State.

Carling Brewing Company was engaged only in interstate business in California, and in the course of such business had no contacts or relationships with the plaintiffs.

The alleged liability sued upon by the appellants arose from an out-of-state act—the acquisition of Griesedieck's assets by Carling—and was entirely unrelated to those activities which Carling maintained in California.

That a state *may* exercise jurisdiction over foreign corporations in actions arising out of the state does not mean that the state has done so, or even that it must.

> *Partin v. Michaels Art Bronze Co.*, 202 F. 2d 541 (3rd Cir., 1953).

Thus, the fact that the United States Supreme Court, in *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952), held that due process will *permit* such an assertion, does not mean that California courts can exercise that jurisdiction unless the legislature has given them power to do so. For the *Perkins* case was remanded to the state court for a determination of whether the law of the forum provided for the exercise of that jurisdiction.

See also:

Dunn v. Cedar Rapids Engineering Co., 152 F. 2d 733 (C. C. A. 9th, 1946);

Partin v. Michaels Art Bronze Co., 202 F. 2d 541 (3rd Cir., 1953);

Jenkins v. Dell Publishing Co., 130 Fed. Supp. 104, 106 (D. C., W. D. Pa., 1955).

This requirement is pointed out in the *Partin* case, *supra,* as follows:

"This requirement that the state provide for the exercise of jurisdiction in a particular set of circumstances is emphasized by the language of Restatement, Judgments, Sections 22 and 23. Section 22 provides:

" 'A court by proper service of process may acquire jurisdiction over an individual not domiciled within the State who carried on a business in the State, as to causes of action arising out of the business done in the State, *if a statute of the State so provides,* at the time when the cause of action arises.' (Emphasis ours.)

"Section 23 provides:

" 'A court by proper service of process may acquire jurisdiction over an individual not domiciled within the State who does acts or owns things in a State which are of a sort dangerous to life or property, as to causes of action arising out of such acts or ownership, *if a statute of the State so provides* at the time when the cause of action arises.' (Emphasis ours.)

"And Comment a. following Section 23 says:

" 'The rule stated in this Section is not applicable if at the time when the cause of action arose there

> was no statute in the State providing for the acquiring of jurisdiction over the defendant.' "

The California Legislature has never given the courts power to exercise this jurisdiction.

This court had occasion in *Dunn v. Cedar Rapids Engineering Co.,* 152 F. 2d 733 (C. C. A. 9th, 1946), to pass upon the question of whether California had exercised jurisdiction over a foreign corporation for a claim arising outside the state.

The order of the trial court quashing the service of summons and dismissing the action was affirmed by the Court of Appeals wherein that court said at 152 F. 2d 733, 734:

> "It does not appear that authorization for California State Courts to entertain the instant action can be read into the statute. Significantly, in Miner v. United Air Lines Transport Corp., D. C. Cal. 1936, 16 F. Supp. 930, 931, this view of the statute was taken as long ago as 1936 by the United States District Court, and no decision appears to have been made on the subject since by the California courts."

While in the *Dunn* case the service of process was upon a statutory as opposed to an actual agent that distinction is of no importance here.

The opinion of the California District Court of Appeal in *Koninklijke Luchtvaart Maatschappij v. Superior Court,* 107 Cal. App. 2d 495 (1952), does not meet this requirement, and the Supreme Court of California appears never to have passed directly on the question. The fact

that the California Supreme Court denied a hearing in the *Koninklijke* case does not constitute an approval of the case.

> "(T)he denial in any case . . . *is not to be taken as an expression of any opinion by this court,* or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, *nor, indeed, as an affirmative approval by this court of the proposition of law laid down in such opinion.*"
>
> *People v. Davis,* 147 Cal. 346, 350, 81 Pac. 718 (1905) (Emphasis ours).

See also:

Bohn v. Bohn, 164 Cal. 532, 537, 129 Pac. 981 (1913);

Western Lithograph Co. v. State Board, 11 Cal. 2d 156, 167, 78 P. 2d 731 (1938);

In re Stevens, 197 Cal. 408, 423, 241 Pac. 88 (1925).

Since the California legislature has not provided for the exercise of jurisdiction by the California courts where the cause of action arose out of the state and is unrelated to the business carried on in the state by the foreign corporation, the District Court was correct in making its order and must be affirmed.

VII.

Under the Circumstances of This Case, Due Process Considerations of Unfairness and Unreasonable Burdens to the Corporation Require the Affirmance of the District Court.

A. Due Process Requires a Balancing of Inconvenience and Unfairness to the Corporation With Its Activities Carried on Within the State.

Assuming, *arguendo,* that California statutes permitted the exercise of jurisdiction over causes of action which arise outside of the State and are unrelated to the business carried on therein, still it must be shown that forcing Carling to defend this suit in California comports with due process.

The United States Supreme Court, in *International Shoe Co. v. Washington,* 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945), as is shown in the Griesedieck argument, set out the minimum contacts and fairness rule. The court stated that the demands of due process might be met by:

> ". . . such contacts of the corporation with the state of the forum as to make it reasonable in the context of our federal system of government, to require the corporation to defend *the particular suit which is brought there.*" (Emphasis ours.)

Under the *International Shoe* decision and that of *Hutchinson v. Chase & Gilbert,* 45 F. 2d 139 (C. C. A. 2d, 1930), due process requires a balancing of the character of the suit brought, and its special facts, with the possible burden and inconveniences to be imposed upon the corporation.

In such a balancing the fact that the act sued upon arose outside of the state and was unrelated to the business carried on therein is critical.

This is apparent from the further language of the opinion in the *International Shoe* case where the court stated:

> "(The activities) resulted in a large volume of interstate business, in the course of which appellant received benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. *The obligation which is here sued upon arose out of those very activities.*" (*Id.,* p. 320.) (Emphasis ours.)

It was evident, the court said, that those activities—which gave rise to the obligation sued upon—established sufficient contacts or ties with the forum to make it reasonable and just according to our notions of fair play and substantial justice to permit the suit.

The United States Supreme Court, in *Perkins v. Benguet Consolidated Mining Co.,* 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952), held that due process would *permit* a state to render an *in personam* judgment against a foreign corporation on a cause of action arising out of the state, but this came only after a consideration of the complex of activities carried on *within* the state.

> "It remains only to consider, in more detail, the issue of whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was 'sufficiently substantial and of such a nature as to *permit* Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from

its activities in Ohio. See International Shoe Co. v. Washington, *supra* (326 U. S. at 318, 90 L. ed. 103, 66 S. Ct. 154, 151 A. L. R. 1057)." (*Id.*, p. 447.)

There the activities of the Benguet Company in Ohio were vastly more extensive than the very limited and entirely interstate business of Carling.

And *Koninklijke Luchtvaart Maatschappij v. Superior Court,* 107 Cal. App. 2d 495, is distinguished for the same reason, and entirely aside from the fact that this statement of law has never been rendered by the California Supreme Court.

Thus the *Perkins* case merely indicates that where the complex of activities carried on within the state by the foreign corporation is extensive enough, this will overbalance the inconvenience to the corporation under the due process balancing test.

California cases have recognized the importance of the relation of the cause of action to the state.

Thus, in *Boote's Hatcheries, etc. Co. v. Superior Court,* 91 Cal. App. 2d 526, 528 (1949), following and paraphrasing the opinion of the United States Supreme Court in the *International Shoe* case, the court said:

> "It is quite evident that the ennumerated activities of petitioner established sufficient contacts and ties in this state to make it reasonable and just according to our conception of fair play and substantial justice that the plaintiff Giebeler should be permitted to *enforce the obligations which petitioner has incurred in this state, and which constitute the basis for his action.*" (Emphasis ours.)

B. Carling's Limited Activity Within the State Does Not Justify Forcing It to Defend This Action in California.

It is pertinent to note that in the *Perkins* case the corporate officers, and presumably the corporate records, of the foreign corporation were in the forum where the suit was brought, and no inconvenience in this regard would be imposed upon the corporation.

In the case at bar, however, the testimony of Carling's top officials would be critical in the defense of the suit, and these officials are not in California, but in Ohio, and it is manifestly unfair to require that they come to California for defense of the suit.

There is the additional point, moreover, that Carling's defense is inevitably linked to and depends upon the testimony of Griesedieck's officials, and of other persons, such as Griesedieck's former president, Edward Jones, who are no longer connected with Griesedieck.

This is so because the plaintiffs have alleged that they had an oral contract with Griesedieck and that Carling assumed this contract. The terms of the alleged oral agreement, if it did exist, or its non-existence, if it did not exist, are all facts within the knowledge of, and could only be established by the testimony of, those present and former officials and employees of Griesedieck.

None of these persons would be subject to subpoena of the United States District Court in California. And none of these witnesses have any interest in Carling's defense so that they might voluntarily appear. This situa-

tion is aggravated by the fact that even should these persons be inclined to voluntarily appear for Carling, they still would be reluctant to do so in the circumstances of this case. For in so doing they would undertake the risk that the Griesedieck Company would be subject to the jurisdiction of the California courts by means of personal service made upon them as officials of Griesedieck present in California.

Carling, therefore, would be faced with a double burden in defending the action in California; the extreme inconvenience in bringing its corporate officials and records from Cleveland, Ohio, to Los Angeles, California, and the practical, if not actual, impossibility of securing the attendance of the very witnesses upon whose testimony its defense must rest.

Therefore, under the due process test of *International Shoe,* which considers inconvenience and unreasonable burdens to the corporation, the fact that (1) the alleged cause of action arose out of the state, (2) is brought by plaintiffs who had no contract, contact or dealings with the corporation, (3) this foreign cause of action does not even have a remote connection with the limited business of Carling in California, and (4) the corporation would be subjected to extreme inconvenience and would have the burden of defending the action without the attendance of witnesses upon whose testimony its defense depends, Carling would be denied due process if it were forced to defend the action in California.

It follows that the Order of the District Court must be affirmed.

Conclusion.

(1) California statutes do not permit service of summons and complaint upon the Secretary of State in the case of foreign corporations engaged solely in interstate business.

(2) California statutes do not permit service of summons and complaint upon the Secretary of State in the case of foreign corporations formerly engaged solely in interstate commerce but which have withdrawn from the state prior to the bringing of the action.

(3) The Griesedieck Company did not solicit orders or sales in California, nor accept orders or sales in California. Even if such acts as were done constituted solicitation, they were not such within the meaning of the California cases which require that solicitation be continuous and systematic. Nor were the plaintiffs ever the agents or employees of Griesedieck, and they cannot, as California law holds, make themselves such by reason of their own unauthorized acts of which Griesedieck had no knowledge.

(4) Griesedieck would be denied due process if forced to defend the action in California.

(5) Griesedieck and Carling did not waive the jurisdictional question by removing the action to the District Court.

(6) California has not exercised jurisdiction over foreign corporations where the cause of action sued upon

arose out of the state and bears no relation to the business done within the state.

(7) Carling would be denied due process if required to defend the action in California.

The action of the District Court was therefore correct and its order must be affirmed.

Respectfully submitted,

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